Filed 1/28/10 Marriage of Rodriguez CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of and MARIA C. and JOSE M. RODRIGUEZ.	
MARIA C. RODRIGUEZ, Respondent, v. JOSE M. RODRIGUEZ, Appellant.	D052160 (Super. Ct. No. DN129979)

APPEAL from an order of the Superior Court of San Diego County, William S. Dato, Judge. Affirmed.

As the trial court noted, this family law case presents something of a procedural knot. As we explain more fully below, we agree with the trial court's resolution of the procedural tangle. In brief, the trial court, having ordered dismissal of the underlying

dissolution proceeding, was thereafter without power to enter any substantive judgment. Thus the trial court properly denied appellant's motion to enter a judgment nunc pro tunc to the day before respondent's wife died.

FACTUAL AND PROCEDURAL BACKGROUND

Although the parties separated on March 18, 1988, Maria C. Rodriguez (Maria) did not file a petition for dissolution of her marriage to Jose M. Rodriguez (Jose) until September 2003. In September 2004 Maria and Jose reached a stipulation resolving some issues and agreeing that other issues, in particular the date of separation and the community character of Maria's residence, would be referred to a retired judge for resolution.

In June 2005 the retired judge made rulings in favor of Maria with respect to the date of separation and in favor of Jose with respect to the community property character of the residence. The retired judge's findings were never entered in the form of a judgment, but instead on December 20, 2005, the parties agreed to mediation of their differences before the judge and to his resolution of Maria's request for certification of an interlocutory appeal of his findings with respect to the community property character of the residence.

Maria died on January 22, 2006. Her counsel moved to dismiss the dissolution proceeding, and on February 14, 2006, the trial court granted the motion and directed that Jose's counsel prepare a formal order dismissing the case.

Rather than preparing an order dismissing the case, Jose's counsel prepared a judgment which conformed to the retired judge's earlier rulings and obtained the retired

judge's signature on the judgment. Jose's counsel then filed the judgment on December 1, 2006.

Thereafter, on June 11, 2007, Jose moved in the trial court for an order entering judgment on the terms of the parties' initial stipulation and the retired judge's findings *nunc pro tunc* to the day before Maria died. The trial court denied Jose's motion. The trial court determined that following its February 14, 2006, order granting Maria's motion to dismiss, it had no power to enter any further order on the merits. The trial court ordered the judgment Jose had obtained from the retired judge stricken and entered a formal written order memorializing its February 14, 2006 order granting the motion to dismiss. Jose filed a timely notice of appeal.[1]

DISCUSSION

In his principal argument on appeal, Jose contends that following Maria's death the trial court had the power to nonetheless enter judgment on the findings made by the retired judge, *nunc pro tunc* to the day before Maria's death. As a general proposition of law, Jose's argument is correct. (See *In re Marriage of Mallory* (1997) 55 Cal.App.4th

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1 While Jose's appeal has been pending in this court, Constance Garcia, a personal representative of Maria's estate, moved in the trial court to substitute in as petitioner in the dissolution proceeding. However, the superior court file does not show that the motion was ever granted and the parties have not offered any explanation for the failure of the trial court to act on Garcia's request. Under these circumstances, we decline to substitute Garcia in as respondent in this appeal. (See former rule 8.768(a), Cal. Rules of Court.) Importantly, Maria's death does not deprive this court of jurisdiction over Jose's appeal. (See e.g. *In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1151.) Because this case has been pending for a substantial period of time, and our disposition will not prejudice the estate's interests, we are not willing to delay it any further while either the trial court or we resolve whatever impediments may exist to Garcia's substitution as a party.

1165, 1176.) "[A] trial court has both the inherent and the statutory power in a marital dissolution action to enter a judgment on all issues submitted to the court for decision before the death of a party." (*Ibid.*) However, as the trial court indicated, this general proposition of law did not permit the trial court to provide Jose with the relief he requested in June 2007.

As we have noted, on February 14, 2006, the trial court ordered that the dissolution action be dismissed. Admittedly, because the minute order was not signed by the trial court and its order was not promptly memorialized in a formal written order, it was not yet an appealable judgment. (See Code Civ. Proc.,[2] § 581d;[3] *In re Marriage of Dupre* (2005) 127 Cal.App.4th 1517, 1524; *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1234, fn. 5.) Thus, arguably, the trial court had not yet divested itself of jurisdiction over the action. (Compare *Estate of Garrett* (2008) 159 Cal.App.4th 831, 838: "A dismissal terminates an action. [Citation]. The dismissal of an entire action deprives the court of subject matter jurisdiction of the matter, as well as of personal jurisdiction over the parties. [Citation.]"

Notwithstanding the absence of a formal order meeting the requirements of section 581d, the order granting the motion to dismiss was not entirely without force or effect. It

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2 All further statutory references are to the Code of Civil Procedure unless otherwise specified.

3 Section 581d provides: "A written dismissal of an action shall be entered in the clerk's register and is effective for all purposes when so entered.

"All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action and those orders when so filed shall constitute judgments and be effective for all purposes, and the clerk shall note those judgments in the register of actions in the case."

was the trial court's ruling on the motion to dismiss and by its terms it prevented any further proceeding in the action until that ruling was properly vacated. Jose could obtain relief from the trial court's ruling by either making a timely motion to reconsider under section 1008, or for relief under section 473. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107-1108.) However, as the trial court noted, Jose made no such attempt to seek relief from the trial court's order granting the motion, and there is nothing in the record which suggests the trial court on its own motion believed that the dismissal should be reconsidered. In the absence of a request for relief which met the requirements of the either statute, or the trial court's willingness to act on its own motion, the court had no power to disturb its February 6, 2006 order. (*Ibid*.)

In this regard the order was somewhat analogous to the order sustaining a demurrer which the court considered in *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788-789 (*Wells*). In *Wells* the trial court gave plaintiff leave to amend following its ruling sustaining defendant's demurrer, and consequently no formal order of dismissal was entered. Instead of amending the complaint, plaintiff voluntarily dismissed his complaint without prejudice under the terms of former section 581, subdivision 1 (now section 581, subdivision (b)(1)), which permitted a dismissal without prejudice at any time before trial or a ruling on a demurrer. (See *id*. at p. 785.) Plaintiff argued that the absence of a formal order on the trial court's ruling permitted plaintiff to file the voluntary dismissal without prejudice. The court rejected both plaintiff's arguments and two earlier cases which had supported it: "[O]nce a general demurrer is sustained with leave to amend and plaintiff does not so amend within the time authorized by the court or

otherwise extended by stipulation or appropriate order, he can no longer voluntarily dismiss his action pursuant to section 581, subdivision 1, *even if the trial court has yet to enter a judgment of dismissal on the sustained demurrer*." (*Wells, supra*, 29 Cal.3d at p. 789, italics added.)

As in *Wells*, while the trial court's February 14, 2006 order did not have the dignity or effect of a judgment of dismissal, it nonetheless could not be ignored by Jose. (See *Le Francois v. Goel, supra*, 35 Cal.4th at p. 1106.) In addition to what we believe is required under *Le Francois v. Goel*, our unwillingness to permit Jose to disturb the order of dismissal is buttressed by significant equitable considerations. Jose should not be permitted to benefit from his counsel's failure to follow the directions of the trial court and prepare the requisite formal order of dismissal and Maria's estate should not be penalized for that failure.

In sum, because it had no authority to disturb its ruling, the trial court did not abuse its discretion in declining to replace its February 14, 2006 dismissal with the nunc pro tunc judgment proposed by Jose. For the same reason, the trial court also acted properly in striking the judgment Jose obtained from the retired judge and filed.

Order affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.